



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
 UNITED STATES OF AMERICA :
 :
 -against- :
 :
 GINO BRUNETTI a/k/a Herbert :
 Alberto Cruz-Ruiz, :
 :
Defendant. :
 -----X

No. 01 Cr. 257 (JFK)

OPINION & ORDER

APPEARANCES

FOR DEFENDANT GINO BRUNETTI:

Pro Se

FOR THE UNITED STATES OF AMERICA:

Kevin Mead

U.S. ATTORNEY'S OFFICE FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN F. KEENAN, United States District Judge:

Before the Court is Defendant Gino Brunetti's renewed pro
se motion for compassionate release (the "Renewed Motion")
 pursuant to 18 U.S.C. § 3582(c)(1)(A). (Renewed Motion, ECF No.
 321.) In his motion, Brunetti seeks a reduction of his sentence
 to time served and his immediate release from custody. The
 Government opposes Brunetti's motion on the grounds that he has
 failed to establish that "extraordinary and compelling reasons"
 exist warranting his release and the sentencing factors of 18
 U.S.C. § 3553(a) weigh against modifying his life sentence.
 (Gov't Letter in Opp'n; ECF No. 323.) For the reasons set forth
 below, Brunetti's Renewed Motion is GRANTED.

I. Background

On August 22, 2001, Brunetti, a Colombian national, was arrested by the Mexican Army and transferred to the United States in connection with a Drug Enforcement Agency ("the DEA") investigation into large-scale narcotics-trafficking.

(Presentence Report ("PSR") ¶ 27.) On May 22, 2002, Brunetti was charged with conspiracy to distribute and possess with intent to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. §§ 841 and 846; distributing and possessing with intent to distribute fifty or more kilograms of cocaine, in violation of 21 U.S.C. § 841; and importing five kilograms or more of cocaine into the United States, in violation of 21 U.S.C. § 963. (PSR ¶¶ 2-4.) The charges stemmed from Brunetti's role as the main source of cocaine for a drug-trafficking organization in the New York City area. (Id.) Brunetti was responsible for facilitating the delivery of large quantities of cocaine into the United States, including a 50-kilogram shipment that was seized during the DEA's investigation. (Id. ¶ 27.)

On May 9, 2002, the Government, pursuant to 21 U.S.C. § 851, filed a Prior Felony Information against Brunetti based on his two prior convictions for: (1) distribution of cocaine in the Central District of California, for which he was sentenced to ten years of imprisonment in February 1988; and (2) possession of narcotics for sale in the State of California, for which he

was sentenced to two years of state imprisonment in November 1986. (Id. ¶¶ 5-6, 79-84.) As a result of the filing, Brunetti faced a mandatory minimum life sentence. See United States v. Brunetti, 376 F.3d 93, 94 (2d Cir. 2004) (per curiam).

Hoping to avoid the mandatory life sentence, Brunetti sought to proffer with the Government. Id. Following a period of negotiations, Brunetti agreed to plead guilty to all three counts pursuant to a plea agreement in exchange for the opportunity to engage in a post-plea proffer session. Id. Following his plea before Judge Allen G. Schwartz (to whom this case was originally assigned), Brunetti sat for two proffer sessions with the Government. Id. The Government, however, ultimately declined to enter into a cooperation agreement with Brunetti and, following Judge Schwartz's death, Brunetti's case was transferred to this Court for post-plea proceedings, including sentencing. Id. at 94 n.1.

"Faced with the fact that his proffer strategy had not turned out as he had hoped," Brunetti asked this Court to reduce his sentence. Id. at 94. On August 11, 2003, this Court rejected Brunetti's request and sentenced him to two concurrent terms of life imprisonment and one additional concurrent term of 120 months' imprisonment to be followed by ten years of supervised release. Id. at 94-95. On July 22, 2004, the Second Circuit affirmed Brunetti's conviction. Id. at 96.

On February 17, 2021, Brunetti, proceeding pro se, filed a motion for compassionate release. (ECF No. 309.) In his initial motion, Brunetti argued that extraordinary and compelling circumstances warranted his release because: (1) he was sentenced under the so-called “three-strike rule” of 21 U.S.C. § 851, which Congress later amended to eliminate the mandatory minimum life sentence; (2) he had rehabilitated himself while in prison; and (3) he suffers from certain medical conditions that place him at high risk of developing severe illness if infected with COVID-19. (Id.) In its opposition to Brunetti’s motion, the Government conceded that Brunetti’s medical conditions, combined with the COVID-19 pandemic, amounted to “extraordinary and compelling reasons” warranting his release. (ECF No. 312.) The Government argued, however, that Brunetti’s motion should be denied because any reduction in his sentence would be inconsistent with the sentencing factors of 18 U.S.C. § 3553(a). (Id.)

On April 9, 2021, the Court denied Brunetti’s motion, concluding that the sentencing factors of § 3553(a) weighed against his release. See United States v. Brunetti, No. 01 CR. 257 (JFK), 2021 WL 1326894, at *3 (S.D.N.Y. Apr. 9, 2021), appeal withdrawn, No. 21-1074, 2021 WL 3204824 (2d Cir. June 14, 2021) (the “April 9 Decision”). Specifically, the Court concluded that the “factors that weigh in Brunetti’s favor, such

as the need to provide necessary medical care, are overshadowed by the combined force of 'the nature and circumstances of the offense' . . . 'the history and characteristics of the defendant' . . . and the need for the sentence imposed to 'reflect the seriousness of the offense,' 'promote respect for the law,' 'provide just punishment for the offense,' 'afford adequate deterrence to criminal conduct,' and 'protect the public from further crimes of the defendant.'" Brunetti, 2021 WL 3204824 at *5 (quoting 18 U.S.C. §§ 3553(a)(1), (2)).

On October 18, 2021, Brunetti filed a renewed motion for compassionate release. (ECF No. 321.) In the instant motion, Brunetti reiterates his argument that his medical conditions, coupled with the presence of COVID-19 at the facility where he is incarcerated, Coleman Medium Federal Correctional Institute ("FCI Coleman"), constitute extraordinary and compelling reasons warranting his immediate release. (Id.) Additionally, Brunetti again argues that his release would be consistent with the sentencing factors of § 3553(a) because, if sentenced today, he would face a mandatory minimum sentence of 25 years of incarceration and, over the course of his imprisonment, he has amassed a significant record of rehabilitation. (Id.)

On November 2, 2021, the Government filed a letter opposing Brunetti's Renewed Motion. (ECF No. 323.) In its letter, the Government argues that extraordinary and compelling reasons no

longer support Brunetti's release because he is fully vaccinated and the COVID-19 positivity rate at FCI Coleman is exceedingly low. (Id.) The Government also renews its argument that any modification of Brunetti's sentence would be inconsistent with the sentencing factors of 18 U.S.C. § 3553(a) due to the seriousness of Brunetti's criminal conduct. (Id.) Specifically, the Government notes that Brunetti was "the primary source of cocaine for a large drug-trafficking organization, and he conspired to import over 150 kilograms of cocaine in this case." (Id.) The Government further notes that "[t]his is [Brunetti's] third serious drug trafficking conviction, and his prior criminal history shows a pattern of immediately resuming narcotics trafficking after release from prison, undeterred even by substantial sentences." (Id.) On December 13, 2021, Brunetti filed a reply to the Government's Letter in Opposition. (Reply to Gov't Letter in Opp'n, ECF No. 327.) In his Reply, Brunetti reiterates his request for release and argues that despite being fully vaccinated, he remains particularly vulnerable to contracting COVID-19 and developing serious illness due to his underlying medical conditions and the prevalence of COVID-19 in FCI Coleman. (ECF No. 327.)

Brunetti is 61 years old and has served approximately 20 years of his life sentence.

II. Applicable Law

Under 18 U.S.C. § 3582(c)(1)(A), as amended by the First Step Act, a district court may reduce a defendant's sentence if it finds that "extraordinary and compelling reasons warrant such a reduction" and "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A). The Court is also required to consider "the factors set forth in [18 U.S.C. §] 3553(a) to the extent that they are applicable." Id. The § 3553(a) factors include "the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from future crimes by the defendant; and the need to avoid unwarranted sentencing disparities." United States v. Roney, 833 F. App'x 850, 852 (2d Cir. 2020) (quoting 18 U.S.C. § 3553(a)). Application of these factors requires a assessment of whether the "factors outweigh the 'extraordinary and compelling reasons' warranting compassionate release . . . [and] whether compassionate release would undermine the goals of the original sentence." United States v. Ebbers, --- F. Supp. ---, No. 02 Cr. 11443 (VEC), 2020 WL 91399, at *7 (S.D.N.Y. Jan. 8, 2020).

In the Second Circuit, the U.S. Sentencing Commission's policy statement concerning what qualifies as an "extraordinary

and compelling" reason for release "is not 'applicable' to compassionate release motions brought by defendants," and "cannot constrain district courts' discretion to consider whether any reasons are extraordinary and compelling." United States v. Brooker, 976 F.3d 228, 236 (2d Cir. 2020). Accordingly, district courts are free to "consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release." Id. at 237; see also United States v. Ciprian, No. 11 Cr. 1032 (PAE), 2021 U.S. Dist. LEXIS 18698, at *5 (S.D.N.Y. Feb. 1, 2021) ("[T]he Court is not constrained by either § 1B1.13's enumeration of extraordinary and compelling reasons or by its freestanding requirement that the defendant seeking release not pose any danger to the community").

"Since the onset of the COVID-19 pandemic, numerous courts have held that the presence of preexisting [medical] conditions that increase the risks associated with the virus, in combination with the conditions of confinement, constitute extraordinary and compelling reasons for a reduction in sentence under 18 U.S.C. § 3582(c)(1)(A)." United States v. Serrano, No. 13 Cr. 58 (AKH), 2020 WL 5259571, at *3 (S.D.N.Y. Sept. 3, 2020) (collecting cases); see also United States v. Bush, No. 17 Cr. 611-4 (AT), 2021 WL 3097417, at *2 (S.D.N.Y. July 21, 2021) (noting "[c]ourts have granted modified sentences in light

of COVID-19 for inmates with illnesses or injuries that make them particularly vulnerable to COVID-19"). When considering such claims, courts in this District "have generally considered the age of the defendant; the severity and documented history of the defendant's health conditions, as well as the defendant's history of managing those conditions in prison; the presence and proliferation of infections in the prison facility at issue; [and] the proportion of the term of incarceration that the defendant has served . . ." United States v. Franco, No. 12 Cr. 932 (PAC), 2020 WL 4344834, at *2 (S.D.N.Y. June 24, 2020).

Finally, the Court notes that pro se litigants, such as Brunetti, "are entitled to a liberal construction of their pleadings, which should be read 'to raise the strongest arguments that they suggest.'" Green v. United States, 260 F.3d 78, 83 (2d Cir. 2001) (quoting Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996)).

III. Analysis

A. Extraordinary and Compelling Reasons

In the instant motion, Brunetti renews his argument that his medical conditions, particularly his coronary artery disease and hypertension, coupled with the presence of COVID-19 at FCI Coleman, constitute "extraordinary and compelling reasons" warranting his immediate release. As noted previously, the Government argues that Brunetti's medical conditions can no

longer justify his release because he is fully vaccinated, and the COVID-19 vaccines remain highly effective at preventing severe illness, hospitalization, and death. (ECF No. 323.) In light of the rapid spread of the Omicron variant and its partial resistance to the COVID-19 vaccines, the Court finds the Government's argument unpersuasive and concludes that Brunetti has established that "extraordinary and compelling circumstances" support his release.

As this Court noted in its April 9 Decision, the Government does not dispute that Brunetti suffers from coronary artery disease and hypertension. See Brunetti, 2021 WL 1326894 *3-5. According to the Centers for Disease Control and Prevention ("CDC"), both medical conditions increase an individual's risk of developing serious illness from COVID-19. See Ctrs. for Disease Control and Prevention, People with Certain Medical Conditions, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (last visited January 10, 2022). Throughout the pandemic, courts in this Circuit have recognized that coronary artery disease and hypertension, in combination with the dangers of COVID-19, constitute "extraordinary and compelling reasons" warranting release. See United States v. Scparta, No. 18 Cr. 578 (AJN), 2020 WL 1910481, at *9 (S.D.N.Y. Apr. 20, 2020) (concluding defendant's hypertension supported his release because "the

[CDC] has identified hypertension as a comorbidity that increases the likelihood of serious risk from COVID-19"); see also United States v. Sedge, No. 16 Cr. 537 (KAM), 2020 WL 2475071, at *3 (E.D.N.Y. May 13, 2020) (concluding extraordinary and compelling reasons supported defendant's release "[g]iven that the defendant is over 50 and has demonstrated existing medical conditions that would place him into a high-risk category including hypertension, hyperlipidemia, and coronary artery disease").

The Court disagrees with the Government's assertion that Brunetti's vaccination status, considered in isolation, "substantially weak[ens]" his claim that his medical conditions constitute extraordinary and compelling reasons warranting his release. (ECF No. 323.) Although the COVID-19 vaccines remain effective at preventing severe illness, they provide comparatively little protection against Omicron infection. See Ctrs. for Disease Control and Prevention, Update on Omicron Variant, December 16, 2021, <https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2021-12-16/06-COVID-Scobie-508.pdf> (last visited Jan. 10, 2022) (noting that the Pfizer-BioNTech vaccine is only 33% effective at preventing Omicron infection). The variant's ability to evade vaccine-related immunity has resulted in an exponential increase in "breakthrough" infections in vaccinated individuals.

See Ctrs. for Disease Control and Prevention, Potential Rapid Increase of Omicron Variant Infections in the United States, <https://www.cdc.gov/coronavirus/2019-ncov/science/forecasting/mathematical-modeling-outbreak.html> (last visited Jan. 10, 2022). In the state of Florida, where FCI Coleman is located, COVID-19 cases increased by 566 percent between December 21, 2021, and January 4, 2022. See N.Y. Times, Coronavirus in the U.S.: Latest Map and Case Count (last visited Jan. 4, 2022),

<https://www.nytimes.com/interactive/2021/us/covid-cases.html>.

As of the date of this Order, FCI Coleman reports four active cases of COVID-19 among inmates and seven among staff. See COVID-19 Cases, Federal Bureau of Prisons,

<https://www.bop.gov/coronavirus/> (last visited Jan. 10, 2022).

These numbers will undoubtedly increase as the Omicron surge continues. See United States v. Johnson, No. 98 Cr. 860(7) (ARR), 2021 WL 5755047, at *4 (E.D.N.Y. Dec. 3, 2021) (noting “[t]he risk of breakthrough infection is greater among incarcerated individuals than members of the general public”)

While the majority of vaccinated individuals infected with the Omicron variant will only experience minor symptoms, “breakthrough” infections can still cause severe, possibly life-threatening illness in individuals who suffer from medical conditions that render them particularly vulnerable to the

virus. See States v. Salemo, No. 11 Cr. 65 (JSR), 2021 WL 4060354, at *6 (S.D.N.Y. Sept. 7, 2021) (noting vaccinated defendant with underlying medical conditions remained at high risk for “a severe case of COVID-19” if infected); see also Johnson, 2021 WL 5755047, at *5 (concluding vaccinated defendant “could face serious illness and even death if infected with COVID-19” due to multiple underlying medical conditions). “For that reason, some courts have continued to find the risk of COVID-19 germane to their analysis of extraordinary and compelling circumstances, even whe[n] . . . the defendant is vaccinated.” Johnson, 2021 WL 5755047, at *5 (collecting cases).

Here, Brunetti suffers from two comorbidities that increase his risk of developing severe illness if infected. Due to the diminished efficacy of the vaccines and the high rate of reinfection in carceral settings, it is very likely that Brunetti will be infected with the Omicron variant if he remains at FCI Coleman. See United States v. Zukerman, 451 F. Supp. 3d 329, 334 (S.D.N.Y. 2020) (noting that prison “conditions make controlling the spread of COVID-19 more challenging and the risk to vulnerable inmates, such as [the defendant], that much greater”). Because Brunetti remains at high risk for developing severe, possibly life-threatening illness if reinfected with COVID-19, the Court concludes that extraordinary and compelling

reasons justify his release. See United States v. Sawicz, 453 F. Supp. 3d 601, 603–605 (E.D.N.Y. 2020) (concluding that, because the defendant suffered from hypertension, he was vulnerable to COVID-19 and thus “the risk of serious illness or death that he faces in prison constitutes an extraordinary and compelling reason militating in favor of his release”). This conclusion reflects the reality that the pandemic has changed since the Court’s April 9 Decision.

B. The § 3553(a) Factors

The Court now turns to the application of the sentencing factors enumerated in 18 U.S.C. § 3553(a). In its Letter in Opposition, the Government argues that the § 3553(a) factors “strongly weigh against” Brunetti’s release because his two concurrent life sentences are “still warranted to serve the purpose of sentencing, including to reflect the serious nature of his criminal conduct, to afford adequate deterrence, and to protect the public from future crimes.” (ECF No. 323.) The Court disagrees.

In considering the § 3553(a) factors in this case, the Court is particularly mindful of the disparity between Brunetti’s mandatory life sentence and the sentence a similarly situated defendant would receive today based on recent changes in the law. As noted previously, the First Step Act amended the recidivist provision of 21 U.S.C. § 841(b) (1) (A) by reducing the

mandatory minimum sentence applicable to Brunetti from life to 25 years. See Pub. L. No. 115-391, § 401(a)(2), 132 Stat. 5194, 5220 (2018). If Brunetti were sentenced today, he would not receive two concurrent terms of life imprisonment for his participation in a large-scale international narcotics organization, even given his criminal history at the time of his sentencing. See United States v. Vargas, 502 F. Supp. 3d 820, 830 (S.D.N.Y. 2020) (concluding life sentence was “unduly harsh” for member of narcotics conspiracy who was neither “the ringleader of the operation nor a kingpin of the organization”). Considering Brunetti’s “sentence in light of current law, it is difficult to escape the conclusion that it is both draconian and exceptionally harsh.” Id. at 826 (internal quotation marks omitted).

As for “the nature and circumstances of the offense” and the need for the sentence to “to reflect the seriousness of the offense, promote respect for the law, provide just punishment, [and] afford adequate deterrence,” 18 U.S.C. §§ 3553(a)(1)–(2), the Court finds that these factors do not overcome the unique circumstances of this case. There can be no doubt that Brunetti’s criminal conduct, including his history of recidivism, is very serious. However, his various narcotics felonies did not involve the use of violence. See Scparta, 2020 WL 1910481, at *8 (noting non-violent nature of defendant’s

otherwise serious crimes weighed in favor of release).

Additionally, the First Step Act's elimination of the applicable mandatory minimum life sentence indicates that Congress no longer considers such a punishment necessary to achieve the purpose of criminal sentencing. See United States v. Haynes, 456 F. Supp. 3d 496, 517 (E.D.N.Y. 2020) (noting that the amendments of the First Step Act amount to "Congressional declaration[s] of what is now considered adequate punishment").

In this case, Brunetti's twenty years of imprisonment is sufficient to "promote respect for the law, provide just punishment, [and] afford adequate deterrence." 18 U.S.C. § 3553(a) (2) (A)–(B). Although the new mandatory minimum for Brunetti's criminal conduct is 25 years, the pandemic has rendered Brunetti's "incarceration harsher and more punitive than would otherwise have been the case." United States v. Rodriguez, 492 F. Supp. 3d 306, 311 (S.D.N.Y. 2020); see also United States v. Romero, No. 15 Cr. 445-18 (PAE), 2021 WL 1518622, at *4 (S.D.N.Y. Apr. 16, 2021) (noting "[a] day spent in prison under extreme lockdown and in fear of contracting a deadly virus exacts a price on a prisoner beyond that imposed by an ordinary day in prison" and "[a]lthough not intended as punishment, incarceration in such conditions is, unavoidably, more punishing"). Additionally, if good time credit is taken into account, Brunetti has served 283 months of the new 300-

month mandatory minimum. The Court, accordingly, concludes that Brunetti's term of imprisonment provides just punishment and adequate deterrence.

As for the "history and characteristics of the defendant" and the "need . . . to provide the defendant with [necessary] medical care," these factors undoubtedly weigh in Brunetti's favor due to his unique vulnerability to COVID-19. See United States v. Pena, No. 15 Cr. 551 (AJN), 2020 WL 2301199, at *4 (S.D.N.Y. May 8, 2020); see also United States v. Rodriguez, No. 17 Cr. 157 (VEC), 2020 WL 3051443, at *3 (S.D.N.Y. June 8, 2020) (noting that the "'history and characteristics of the defendant' and the 'need . . . to provide the defendant with needed . . . medical care,' . . . are factors that can support a sentence reduction during [the COVID-19] pandemic" (citations omitted)). Additionally, despite having no realistic hope of release, Brunetti has undertaken considerable efforts to rehabilitate himself over the past two decades. See Pepper v. United States, 562 U.S. 476, 491, 131 S.Ct. 1229, 179 L.Ed.2d 196 (2011) (noting "evidence of post sentencing rehabilitation may be highly relevant to several of the § 3553(a) factors that Congress has expressly instructed district courts to consider at sentencing"). While incarcerated, Brunetti has earned a GED, completed 80 additional educational and vocational courses, and maintained a clean disciplinary record. See United States v.

Rodriguez, 492 F. Supp. 3d 306, 314 (S.D.N.Y. 2020) (concluding that the defendant's "extraordinary efforts at rehabilitation" and "remarkable postsentencing record weigh[ed] strongly in favor of a sentence reduction").

Finally, as to the need "to protect the public from further crimes of the defendant," 18 U.S.C. § 3553(a)(2)(C), the Court finds that this factor does not preclude Brunetti's release. Despite Brunetti's criminal history, recidivism in this case is unlikely given Brunetti's age, poor health, and aforementioned rehabilitation. See Rodriguez, 492 F. Supp. 3d at 315 (observing that the defendant's release at the age of 60 would "mak[e] the likelihood of re-offending . . . remote"). Moreover, the Court notes that Brunetti is subject to an Immigrations and Customs Enforcement ("ICE") detainer and will be deported upon his release. See United States v. Rojas, 2020 U.S. Dist. LEXIS 238647, *10 (S.D.N.Y. Dec. 18, 2020) (concluding that the safety of the community will not be adversely affected by the defendants' release because the defendant "will be released to ICE custody and then deported").

Bearing in mind that "the letter kills but the spirit gives life," 2 Corinthians 3:6, the Court concludes that the sentencing factors of § 3553(a) no longer outweigh the "extraordinary and compelling reasons" that support Brunetti's motion for compassionate release.

IV. Conclusion

Accordingly, the Court GRANTS Brunetti's Renewed Motion (ECF No. 321) pursuant to 18 U.S.C. § 3582(c)(1)(A). It is hereby ORDERED that Gino Brunetti, also known as Herbert Alberto Cruz-Ruiz, Inmate No. 86932-012, is RESENTENCED to TIME SERVED and 10 years of supervised released subject to any detainer. It is FURTHER ORDERED that Brunetti is to be released solely to ICE custody for the purposes of initiating his removal to Colombia. This ORDER is STAYED for twenty-one days to allow Brunetti to make any applications to ICE regarding the immigration detainer and to allow the Bureau of Prisons to make all necessary arrangements for Brunetti's release into ICE custody. See United States v. Beras, No. 99 Cr. 75 (RA), 2020 WL 7496354, at *3 (S.D.N.Y. Dec. 20, 2020).

SO ORDERED.

Dated: New York, New York
January 10, 2022


John F. Keenan
United States District Judge